

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

-----X
JEFF SCHMIDT,

Plaintiff,

-against-

AMERICAN INSTITUTE OF PHYSICS,

Defendant.
-----X

Civil Action No.: 1:03CV01691
(RMU)

DEFENDANT'S RESPONSE TO PLAINTIFF'S SURREPLY

The American Institute of Physics (AIP) submits this response and the attached affidavits to address Plaintiff Jeff Schmidt's claim that he was "employed in the District of Columbia" because he worked from home during some portion of 1997 and 1998 before he was discharged in May, 2000. AIP's witnesses did not know that Schmidt had worked from home during portions of 1997 and 1998. Moreover, regardless of where he performed his work duties, Schmidt was employed in College Park, Maryland, and the fact that he may have worked from home has no bearing on the venue analysis. In response to Schmidt's Surreply, AIP states as follows.

I. AIP's Witnesses Did Not Know Schmidt Had Worked From Home.

In responding to Plaintiff's contention that he had worked from home, AIP made its best efforts to gather relevant information regarding Plaintiff's worksite. Neither AIP's Executive Director and CEO Marc Brodsky; nor AIP Vice President, Human Resources Teresa Braun; nor AIP's Vice President, Physics Resources, James Stith (who was Schmidt's second-

level supervisor), were aware that during 1997 and 1998¹ Schmidt often worked from home. All of these individuals, who were actively involved in preparing AIP's Motion to Transfer Venue, were surprised to learn that Schmidt contended he worked from home. All of these individuals believed Schmidt had worked in AIP's College Park office, and, if he worked from home, did so only occasionally. *See, e.g.,* Affidavit of James Stith ("Second Stith Affidavit") (Exhibit 2) at ¶ 4.

With respect to Dr. Stith in particular, Dr. Stith did not start work full-time at AIP until March of 1998, and did not know that Schmidt had apparently worked from home several days per week in 1997 and portions of 1998. Second Stith Affidavit at ¶ 4. Dr. Stith regularly saw Schmidt at staff meetings. *See* Second Stith Affidavit at ¶ 7; Benka Affidavit at ¶ 16. In March through May of 1998, shortly after Dr. Stith began his employment with AIP, Schmidt (along with the other *Physics Today* staff members) was preparing *Physics Today's* 50th Anniversary Issue. During this time, Schmidt worked in College Park daily. *See* Benka Affidavit at ¶ 13.

Schmidt's immediate supervisor, Stephen Benka, apparently knew Schmidt worked from home on a regular basis, which was for Schmidt's own convenience. *See* Affidavit of Stephen Benka, submitted herewith. However, at the time AIP was preparing its Motion to Transfer Venue and Reply, Benka was unavailable because he was in Washington State caring for his ill son. *See* Benka Affidavit at ¶ 4. Benka has no reason to believe Dr. Stith was aware that Schmidt worked from home. *See* Benka Affidavit at ¶ 10.

¹ Although Schmidt claims that he generally worked from home until his discharge in May of 2000, Schmidt submitted work schedules only through the end of 1998. In addition, there are several gaps in the work schedules submitted by Schmidt. For example, Schmidt failed to submit work schedules for most of March 1998 through May 1998. During this time, Schmidt (along with the other *Physics Today* staff members) was preparing *Physics Today's* 50th Anniversary Issue, and he worked in College Park daily. *See* Affidavit of Stephen Benka ("Benka Affidavit") (Exhibit 1) at ¶ 13. AIP does not keep these schedules, so it cannot address Schmidt's contention that he worked from home after 1998. *Id.*

II. It Is Irrelevant Whether or Not Schmidt Worked From Home.

In any event, whether Schmidt worked from home or in College Park is irrelevant to the venue analysis. A case like this, where jurisdiction is not founded solely on diversity of citizenship, "may ... be brought only in (1) a judicial district wherein any defendant resides ..., or (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred..." 28 U.S.C. §1391(b)(1)(2). If Schmidt had filed his action here, venue would have been improper. Even if Schmidt worked from home, his work location was College Park. And even if Schmidt worked from home, "a substantial part of the events or omissions giving rise to the claim" did not occur there. *See* AIP's Reply Brief at 3. Plaintiff's managers were not working in Plaintiff's home when they allegedly committed the acts about which Plaintiff complains. The decision to discharge Schmidt and the discharge itself occurred in College Park. *See* Benka Affidavit at ¶¶ 24-25.

AIP seeks a transfer of venue under 28 U.S.C. § 1404(a), which provides that a District Court may transfer a civil action to another district where it might have been brought "for the convenience of parties and witnesses, in the interest of justice." In analyzing whether to exercise its discretion to transfer venue, a district court examines whether 1) the action might originally have been brought in the district to where transfer is sought; and 2) the interests of the parties, the witnesses and justice support venue transfer. *Id.* at 5-6. Kafack v. Primerica Life Insurance Co., 934 F. Supp. 5-6 (D.D.C. 1996) (internal citations omitted). Plaintiff's alleged telecommuting from the District of Columbia is irrelevant to this analysis. *See* AIP's Reply Brief.

III. Conclusion

AIP regrets that its witnesses were misinformed regarding the frequency with which Schmidt commuted from home during 1997 and portions of 1998. Throughout the pendency of this case, AIP has made its best efforts to gather and submit truthful and complete information to the Court. AIP is unable to draw any conclusions regarding the frequency with which Schmidt worked from home in 1999 and 2000, because it does not keep copies of work schedules. However, this issue is irrelevant to the venue analysis. For all of the reasons stated in AIP's Motion to Transfer Venue and Reply Brief, this Court should transfer this case to the United States District Court for the District of Maryland.

Dated: February 6, 2004

JACKSON LEWIS LLP
ATTORNEYS FOR DEFENDANT
8614 Westwood Center Drive, Suite 950
Vienna, Virginia 22182
(703) 821-2189
(703) 821-2267 *facsimile*

By: /s/
Teresa Burke Wright

CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of February, 2004, I caused a true and correct copy of the foregoing Defendant's Response to Plaintiff's Motion for Leave to File Sur-Reply to be served, via First-Class Mail, by depositing said copy into an official U.S. Postal Service depository addressed as follows:

JEFF SCHMIDT
PLAINTIFF PRO SE
3003 Van Ness Street, NW #W406
Washington, DC 20008

/s/
Teresa Burke Wright

2. I submit this Affidavit in support of Defendant American Institute of Physics' ("AIP's") Motion to Transfer Venue from the United States District Court, District of Columbia, to the United States District Court for the District of Maryland, Southern Division.

3. I have been employed with AIP since December 1993. I am the Editor of *Physics Today*. I was Plaintiff Schmidt's direct supervisor from in or around September 1994 until his discharge. I report to Randolph A. Nanna, Publisher of *Physics Today*. Mr. Nanna reports to Jim Stith, AIP's Vice President, Physics Resources.

4. I was unable to submit an Affidavit responding to Mr. Schmidt's initial objections to AIP's Motion to Transfer Venue. I was unavailable at that time because I was in the State of Washington caring for my ill son.

5. Mr. Schmidt worked for AIP in New York from 1981 to 1993. In 1993, AIP moved its corporate offices to College Park, Maryland. Mr. Schmidt, along with many other AIP employees, relocated to the College Park, Maryland area.

6. It is my understanding that at all times during Mr. Schmidt's employment with AIP, he was employed at will. He had no employment contract.

7. It also is my understanding that when relocating to the College Park, Maryland area, Jeff Schmidt elected to live in the District of Columbia. AIP neither required, nor encouraged, Mr. Schmidt to live in the District of Columbia. AIP had no opinion whatsoever regarding where Mr. Schmidt chose to live in the College Park, Maryland metropolitan area.

8. Mr. Schmidt's statement that he "worked for AIP in the District of Columbia from July 25, 1997 until AIP fired me on May 31, 2000" (Schmidt Affidavit at ¶ 8) is entirely false. From 1993 until 2000, Mr. Schmidt worked for AIP in College Park, Maryland as an Associate/Senior Associate Editor of *Physics Today*. During this time, all decisions regarding Mr. Schmidt's employment were made in College Park,

including the decision to discharge him. All personnel records regarding Mr. Schmidt were, and remain, maintained in College Park.

9. I am aware that Mr. Schmidt performed work from his home in the District of Columbia. However, AIP never requested that Mr. Schmidt work from his home. Any time that Mr. Schmidt worked from home, he did so for personal reasons. AIP derived no benefit from the fact that Mr. Schmidt worked from home.

10. It is my understanding that Dr. Stith submitted an Affidavit in this matter stating that Mr. Schmidt only occasionally worked from home. I have no reason to believe that Dr. Stith was aware that Mr. Schmidt worked from home several days a week. I do not recall any specific discussion with Dr. Stith about the fact that Mr. Schmidt worked from home several days a week during some workweeks. I never requested that Dr. Stith authorize permission for Mr. Schmidt (or any other employee) to work from home.

11. It also is my understanding that Mr. Schmidt has submitted 38 work location schedules for selected work weeks in 1997 and 1998. Those schedules indicate that, during those weeks, he worked several days from his home. Although Mr. Schmidt may have performed work from his home in the District of Columbia, as reflected in the schedules, I never considered him to be employed in the District of Columbia. Rather, at all times during his employment with AIP, his actual place of employment was at AIP in College Park, Maryland.

12. I work out of AIP's College Park, Maryland offices. *Physics Today* is published in College Park, Maryland: editorial assignments are made in College Park; staff meetings are held in College Park; decisions regarding editorial content are

made in College Park; Mr. Nanna and his staff work in College Park; and the magazine's artwork is developed in College Park. Quite simply, all decisions regarding *Physics Today*, including decisions regarding the magazine's employees, are made in College Park.

13. Mr. Schmidt has submitted only self-serving work location schedules, presenting an incomplete and misleading picture. For example, Mr. Schmidt has not presented location schedules for most of March 1998 through May 1998. During this time, Mr. Schmidt (along with the other *Physics Today* staff members) was preparing *Physics Today's* 50th Anniversary Issue. During this time, Mr. Schmidt worked in College Park daily.¹

14. In addition, Mr. Schmidt took a six-month sabbatical from in or around December 1998 through May of 1999, during which he performed no work for AIP at all. Upon his return from sabbatical, Mr. Schmidt requested, and was granted, permission to become a part-time employee; accordingly, he did not work five days per week starting in June 1999.

15. Significantly, all discussions regarding Mr. Schmidt's requests to take a sabbatical, and to become a part-time employee, occurred in College Park, Maryland.

16. Mr. Schmidt's statement that he "participated in *Physics Today* staff meetings by telephone (speakerphone) from the District of Columbia" also is not entirely true (Schmidt Affidavit at ¶20). Mr. Schmidt was present, in College Park, for the majority of *Physics Today* staff meetings.

¹ *Physics Today* does not save the weekly location schedules.

17. Mr. Schmidt's claim that after he became a part-time employee, he "no longer had [his] own office at *Physics Today's* main office to use when [he] visited there" is not true. Mr. Schmidt did not "visit" AIP's College Park, Maryland office; he worked there until his discharge on May 31, 2000. Throughout my tenure as his supervisor, Mr. Schmidt always had an office in College Park, Maryland.

18. Starting in or around May 1999, Mr. Schmidt shared office space with another employee because, *at his request, Mr. Schmidt became a part-time employee.* Mr. Schmidt worked 2/3 of each week. In order to accommodate Mr. Schmidt, another employee was hired to do the remaining 1/3 of Mr. Schmidt's job. The employee with whom Mr. Schmidt shared his job also shared his office. Mr. Schmidt's nameplate remained on the door of that office until after his discharge on May 31, 2000. Indeed, after Mr. Schmidt was discharged, he asked an AIP human resources representative to retrieve his personal belongings from his AIP office.

19. Further, AIP did not "reduce overhead costs" as a result of this arrangement. In fact, overhead costs were increased because AIP had to hire another person to do part of Mr. Schmidt's job. To the best of my knowledge, no one at AIP ever told Mr. Schmidt that his shared office "reduced overhead costs."

20. AIP has a policy of providing computer software allowing remote computer access, and paying one-half, up to a maximum of \$1000, the cost of a home computer for certain exempt employees. Mr. Schmidt took advantage of this policy to receive reimbursement for a portion of the cost of his home computer. The fact that an employee obtains reimbursement under this policy is not an indication that the employee is authorized to telecommute on a regular basis. In fact, there are some employees whose

work requires them to work from home. For those individuals, AIP pays the *entire cost of a home computer*. Mr. Schmidt was not one of these individuals.

21. When Mr. Schmidt worked from home, he worked on a computer that was connected to AIP's server in College Park, Maryland; sent and received e-mails through the College Park office; and submitted his work product to AIP employees in College Park.

22. Mr. Schmidt was not discharged because of any "workplace activism." Instead, Mr. Schmidt was discharged because in a book he wrote and published in 2000, he publicly proclaimed that he had "stolen" work time from AIP in order to write his manuscript. In his book, Mr. Schmidt stated:

This book is stolen. Written in part on stolen time, that is. I felt I had no choice but to do it that way. Like millions of others who work for a living, I was giving most of my prime time to my employer. My job simply didn't leave me enough energy for a major project of my own, and no one was about to hire me to pursue my own vision. . . So I began spending some office time on my own work...

(See Exhibit A)

23. Mr. Schmidt caused his own discharge by his admission that he "stole" time from AIP to write an almost 300 page book. No employee is entitled to use work time for his private pursuits, instead of doing the job he is being paid to do. Schmidt's bold admission could not go unaddressed. To do so would ignore the full effort contributions of AIP's hundreds of other workers.

24. The decision to terminate Mr. Schmidt's employment was made in College Park, Maryland, and had no connection to the District of Columbia.

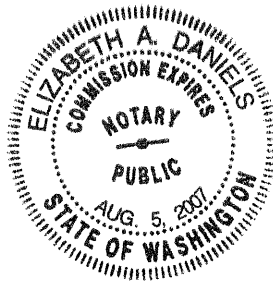
25. On the day he was discharged, Mr. Schmidt was at work in College Park, Maryland. AIP's decision to discharge Mr. Schmidt was communicated to him in College Park, Maryland.

Stephen Benka
STEPHEN BENKA

Sworn to before me this
5 day of February, 2004.

Elizabeth A. Daniels
Notary Public

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INTRODUCTION

This book is stolen. Written in part on stolen time, that is. I felt I had no choice but to do it that way. Like millions of others who work for a living, I was giving most of my prime time to my employer. My job simply didn't leave me enough energy for a major project of my own, and no one was about to hire me to pursue my own vision, especially given my irreverent attitude toward employers. I was working in New York City as an editor at a glossy science magazine, but my job, like most professional jobs, was not intellectually challenging and allowed only the most constrained creativity. I knew that if I were not contending with real intellectual challenges and exercising real creativity—and if I were not doing anything to shape the world according to my own ideals—life would be unsatisfying, not to mention stressful and unexciting. The thought of just accepting my situation seemed insane. So I began spending some office time on my own work, dumped my TV to reappropriate some of my time at home, and wrote this book. Not coincidentally, it is about professionals, their role in society, and the hidden battle over personal identity that rages in professional education and employment.

The predicament I was in will sound painfully familiar to many professionals. Indeed, generally speaking, professionals today are not happy campers. After years of worshipping work, many seemingly successful professionals are disheartened and burned out, not because of their 70-hour workweeks, but because their salaries are all they have to show for their life-consuming efforts. They long for psychic rewards, but their employers' emphasis on control and the bottom line is giving them only increased workloads, closer scrutiny by management and unprecedented anxiety about job security. In this way the cold reality of employer priorities has led to personal crises for many of this country's 21 million professionals.

Burned-out professionals may not be immediately obvious to the casual observer, because typically they stay on the job and maintain their usual high level of output. But they feel like they are just going through the motions. They have less genuine curiosity about their work, feel less motivated to do it and get less

DEFENDANT'S
EXHIBIT

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P. 18

NO. 1003

JACKSON LEWIS

44PM

JEFF SCHMIDT,

Plaintiff,

-against-

AMERICAN INSTITUTE OF PHYSICS,

Defendant.

Civil Action No.: 1:03CV01691
(RMU)

STATE OF MARYLAND)
)ss.:
COUNTY OF PRINCE GEORGE'S)

1. I am not a party to the above-captioned action. I make the statements herein based upon my own personal knowledge, except such matters as are alleged on information and belief, and as to those matters, I believe them to be true.

2. I submit this Affidavit in support of Defendant American Institute of Physics's ("AIP's") Motion to Transfer Venue from the United States District Court, District of Columbia to the United States District Court for the District of Maryland, Southern Division, and to clarify statements that I made in an Affidavit that I attested to on November 13, 2003, which was submitted in support of Defendant's Motion.

3. It is my understanding that Mr. Schmidt has submitted 38 schedules for selected weeks in 1997 and 1998. Those schedules indicate that on certain days during those weeks, he could be found at home.

4. As I stated in my prior Affidavit, I was unaware that Mr. Schmidt worked from home on a "regular" basis. I did not become employed full-time by AIP until March 1998. I did not know that, in 1997 and 1998 (or at any other time), Mr. Schmidt purportedly worked from home several days a week. I never had any discussions with Steve Benka (Schmidt's direct supervisor), Mr. Schmidt or any other AIP employee, about the fact that Mr. Schmidt may have worked from home several days a week. No one requested that I authorize permission for Mr. Schmidt (or any other employee) to work from home.

5. I also was completely unaware that *Physics Today* published schedules. Prior to learning of Mr. Schmidt's instant submissions, I have never seen the schedules submitted by Mr. Schmidt (or was aware they existed).

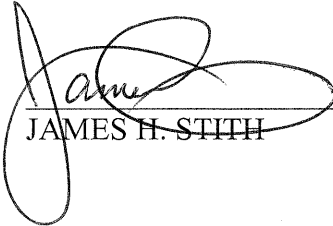
6. Based on my own direct observations, I had no knowledge that Mr. Schmidt purportedly worked from home several days a week. I frequently saw Mr. Schmidt at AIP's offices in College Park, Maryland.

7. I do not recall Mr. Schmidt ever being unavailable to meet with me because he was not present at AIP's College Park, Maryland offices. All meetings that I had with him occurred in AIP's offices in College Park. Further, I recall him being present at the *Physics Today* staff meetings that I attended in College Park, Maryland.

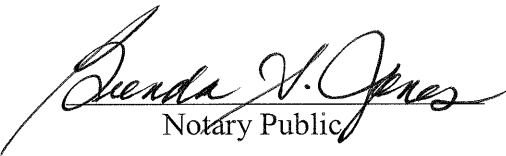
8. That Mr. Schmidt may have worked several days from home does not change the fact that his place of employment remained at AIP in College Park, Maryland.

9. The decision to discharge Mr. Schmidt (in which I participated) was made in College Park, Maryland. Indeed, on the day he was discharged, Mr.

Schmidt was at work in his office in College Park, Maryland. AIP's decision to discharge Mr. Schmidt was communicated to him in College Park, Maryland.


JAMES H. STITH

Sworn to before me this
5th day of February, 2004.


Notary Public

BRENDA A. JONES
Notary Public, State of Maryland
County of Prince Georges
Commission Expires May 26, 2004

Oppositions and Replies1:03-cv-01691-RMU SCHMIDT v. AMERICAN INSTITUTE OF PHYSICS**U.S. District Court****District of Columbia**

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RESPONSE to *Plaintiff's Surreply* filed by AMERICAN INSTITUTE OF PHYSICS. (Attachments: # (1) Affidavit Stephen Benka# (2) Affidavit James H. Stith)(Wright, Teresa)

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Teresa Burke Wright wrightt@jacksonlewis.com, hansenb@jacksonlewis.com

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